Supreme Court, U.S.
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NO. 93-184

In the Supreme Court of the United States

OCTOBER TERM, 1993

REX ALLEN JERNIGAN and ROSE B. JERNIGAN
Petitioners

versus

ASHLAND OIL, INC., ASHLAND PIPE LINE CO. AND DRILLED CROSSINGS, INC.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In cases involving alleged improper or fraudulent joinder of parties is the requirement that all defendants must join in the petition to remove pursuant to 28 USCS 1441 and 1446 applicable?

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Ruling signed by F. A. Little, Jr., United States District Judge for the Western District of Louisiana, filed August 7, 1990 (denying plaintiffs' Motion to Remand).

Ruling signed by F. A. Little, Jr., United States District Court for the Western District of Louisiana, filed December 5, 1990 (denying plaintiffs' Motion to Reconsider).

Judgment signed by F. A. Little, Jr., United States District Court for the Western District of Louisiana, filed February 26, 1991 and Ruling (written reasons) (dismissing plaintiffs' claims against Drilled Crossings, Inc.).

Judgment signed by F. A. Little, Jr., United States District Court for the Western District of Louisiana, filed February 26, 1991 and Ruling (written reasons) (dismissing plaintiffs' claims against Theta II Enterprises, Inc.).

Judgment signed by F. A. Little, Jr., United States District Court for the Western District of Louisiana, filed December 16, 1991 and Ruling (written reasons) (granting Ashland Pipe Line's Motion for Summary Judgment and dismissing all claims against Ashland Pipe Line).

Ruling signed by F. A. Little, Jr., United States District Judge for the Western District of Louisiana, filed August 24, 1992 (amending Court's Judgment of December 18, 1991 granting summary judgment in favor of Ashland Oil, Inc. and Ashland Pipe Line Company and dismissing plaintiffs' claims against defendants; granting

OPINIONS BELOW (continued)

summary judgment in favor of Ashland Oil, Inc. and Ashland Pipe Line company and dismissing Drilled Crossings, Inc.'s claims against Ashland for indemnity).

Opinion of the United States Court of Appeals for the Fifth Circuit rendered April 30, 1993.

JURISDICTION

The final decision of the District Court was entered on August 24, 1992. An appeal was taken to the Fifth Circuit and its decision was entered on April 30, 1993 and there was no request for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On January 10, 1990, plaintiffs, Rex Allen Jernigan, Husband of/and Rose B. Jernigan, domiciled in the State of Louisiana filed suit in the 12th Judicial District Court, Parish of Avoyelles, against Ashland Oil, Inc. and Ashland Pipe Line Company, both foreign corporations and Drilled Crossings, Inc., a Louisiana corporation, for injuries sustained on February 4, 1989 while working on a pipeline.

An Amended Petition was filed January 29, 1990 adding defendants Baker Pipeline, Inc., Theta II Enterprises, Inc., and Baker Pipeline, a subsidiary of Theta II Enterprises, Inc., Louisiana corporations.

Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. was served on January 29, 1990. Theta II Enterprises, Inc. was served on January 29, 1990. Drilled Crossings, Inc. was served on January 29, 1990. Ashland Oil was served on February 2, 1990. Ashland Pipe Line Company was served on February 28, 1990.

Theta II Enterprises, Inc. answered the original and amended petition on February 15, 1990 and the State District Judge signed an order for a jury bond. Drilled

Crossings, Inc. answered on March 26, 1990 and the State District Judge signed an order for a jury bond.

Ashland Oil, Inc. and Ashland Pipe Line Company filed an extension of time as to both the original petition and supplemental petition on February 14, 1990. (Ashland Oil, Inc. was served with the original petition on February 2, 1990 and Ashland Pipe Line was served on February 28, 1990.)

On March 30, 1990 Ashland Oil, Inc. and Ashland Pipe Line Company filed a Notice of Removal. Said notice did not state that the other defendants had agreed to the removal and it was filed fifty-six (56) days after Ashland Oil, Inc. was served with the petition (February 2, 1990) and over sixty (60) days from the date of service on Theta II Enterprises, Inc. and Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. (January 29, 1990).

Plaintiffs, within thirty (30) days on April 30, 1990, timely filed a motion to remand alleging the removal was improper. On August 7, 1990, without reasons, the District Court denied the motion to remand. A motion for reconsideration was filed on August 16, 1990 and denied with written reasons on December 5, 1990.

Subsequently, Ashland Oil, Inc. and Ashland Pipe Line Company, Drilled Crossings, Inc. and Theta II Enterprises, Inc. filed motions for summary judgment which were granted.

An appeal was filed with the United States Court of Appeals for the Fifth Circuit alleging among other things

that the removal was "fatally defective" because the removal petition filed by Ashland Oil, Inc. and Ashland Pipe Line Company failed to state why the other defendants did not join in the petition for removal. The Fifth Circuit held that cases involving alleged improper or fraudulent joinder of parties are an exception to the rule. No authority was cited.

STATEMENT OF THE FACTS

Rex A. Jernigan was employed by the Baker family of Houma, Louisiana during the years 1985 to 1989. During that time, James R. Baker, *Sr.*, James R. Baker, *Jr.* and Jerry *G.* Baker owned various pipeline companies named Baker Pipeline Construction Co., Inc., Baker Pipeline, Inc. and Theta II Enterprises, Inc. Each of these corporations hired and paid Rex A. Jernigan during the years 1985 to 1988.

On February 4, 1989, Rex A. Jernigan was injured while working on a pipeline job in Avoyelles Parish owned by Ashland Oil, Inc. and/or Ashland Pipe Line Company.

In early December, 1989, Rex A. Jernigan retained counsel and suit was filed in the United States District Court for the Eastern District of Louisiana on December 11, 1989 bearing Civil Action 89-5288, Section "M", against Ashland Oil, Inc. and Ashland Pipe Line Company. Jurisdiction was based upon diversity of citizenship. Rex A. Jernigan was not sure which Baker corporation he worked for on February 4, 1989 and was not being paid workmen's compensation benefits.

The deposition of James R. Baker, *Jr.* was taken on January 5, 1990 and James R. Baker, Jr. stated *under oath* that Baker Pipeline Construction Co., Inc. was totally owned by his brother, Jerry *G.* Baker, and had nothing to do with the job on which Rex A. Jernigan was injured on February 4, 1989 in Avoyelles Parish and a letter dated January 3, 1989 (typographical error - should read "1990") from Jerry *G.* Baker on letterhead from Baker Pipeline Construction Co., Inc. stating Rex A. Jernigan was not employed on February 4, 1989 and that Baker Pipeline Construction Co., Inc. had no personnel working at the job in Marksville (Avoyelles Parish) at the time of the accident on February 4, 1989 was attached to the deposition.

In the same deposition James R. Baker, *Jr.* stated that Baker Pipeline, Inc. was a Texas corporation dissolved prior to February 4, 1989 and that on February 4, 1989 Rex A. Jernigan was employed by Theta II Enterprises, Inc. and Theta II Enterprises, Inc. had a written contract with Drilled Crossings, Inc. to do the pipeline job. In turn, Drilled Crossings, Inc. had a contract to do the pipeline job with Ashland Oil, Inc. and/or Ashland Pipe Line Company.

Since Drilled Crossings, Inc. was a Louisiana corporation suit was filed in Avoyelles Parish on January 10, 1990 against Ashland Oil, Inc., Ashland Pipe Line Company and Drilled Crossings, Inc. If Drilled Crossings, Inc. had been added as a defendant in the suit filed in the Eastern District, the basis of jurisdiction, diversity, would have been destroyed.

In the interim, in the litigation filed in the Eastern District of Louisiana, counsel for Ashland Oil, Inc. and

Ashland Pipe Line Company furnished undersigned counsel a contract between Drilled Crossings, Inc. and "Baker Pipeline" dated January 6, 1989 and signed by "Jerry *G.* Baker".

At this point undersigned counsel was not sure which Baker corporation Drilled Crossings, Inc. had contracted with because Jerry R. Baker, *Jr.* in his deposition on January 5, 1990 stated that Rex A. Jernigan worked for Theta II Enterprises, Inc. on February 4, 1989 and Theta II Enterprises, Inc. had a written contract with Drilled Crossings, Inc. on February 4, 1989. Furthermore, Jerry R. Baker, *Jr.* stated and his brother, Jerry *G.* Baker, in a letter dated January 3, 1989 (typographical error - should read 1990) stated Baker Pipeline Construction, Inc. had no contract with Drilled Crossings, Inc. on February 4, 1989. Yet the contract furnished by counsel for Ashland Oil, Inc. and Ashland Pipe Line Company between Drilled Crossings, Inc. and "Baker Pipeline" dated January 6, 1989 was signed by Jerry *G.* Baker, sole owner of Baker Pipeline Construction Co., Inc.

Therefore, on January 26, 1990, Rex A. Jernigan amended his suit in Avoyelles Parish to add Baker Pipeline, Inc., a subsidiary of Theta II Enterprises, Inc. (a Louisiana corporation), Theta II Enterprises, Inc. (a Louisiana corporation) and Baker Pipeline, Inc. (a Louisiana corporation) believing that Rex A. Jernigan was really employed by Baker Pipeline Construction Co., Inc. on February 4, 1989 because Jerry *G.* Baker had signed the contract with Drilled Crossings, Inc. dated January 6, 1989.

It was subsequently established through discovery that for the work done on February 4, 1989 Rex A. Jernigan was paid with a check issued by Theta II Enterprises, Inc.

From all of the above certain facts are not disputed. Ashland Oil, Inc. and/or Ashland Pipe Line Company contracted with Drilled Crossings, Inc. to do the pipeline job in question. Drilled Crossings, Inc. signed a written contract with "Baker Pipeline" on January 6, 1989 and the contract was signed by Jerry *G.* Baker, owner of Baker Pipeline Construction Co., Inc. The accident occurred on February 4, 1989. Rex A. Jernigan was paid by Theta II Enterprises, Inc. On February 9, 1989, after the accident, Drilled Crossings, Inc. entered into another contract with Baker Pipeline - a subsidiary of Theta II Enterprises, Inc. signed by James R. Baker, *Jr.*

The following sequence of pleading and service are not disputed:

A. On January 10, 1990 plaintiffs, Jernigan, domiciled in the State of Louisiana filed suit in the 12th Judicial District Court, Parish of Avoyelles, against Ashland Oil, Inc. and/or Ashland Pipe Line Company, foreign corporations, and Drilled Crossings, Inc., a Louisiana corporation. (Doc. #00091)

B. On January 26, 1990 plaintiffs, Jernigan, filed a First Supplemental and Amending Petition naming additional defendants, Baker Pipeline, Inc. and Theta Enterprises, Inc. and Baker Pipeline, a subsidiary of Theta II Enterprises, Inc., all Louisiana corporations. (Doc. #00097)

C. Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. was served on January 29, 1990. (Doc. #000106)

D. Theta II Enterprises, Inc. was served on January 29, 1990. (Doc. #000103)

E. Drilled Crossings, Inc. was served on January 29, 1990. (Doc. #000105)

F. Ashland Oil, Inc. was served on February 2, 1990. (Doc. #000107)

G. Ashland Pipe Line Company was served on February 28, 1990. (Doc. #000118)

H. Ashland Oil, Inc. and Ashland Pipe Line Company filed an Extension of Time to plead as to both the original petition and amended petition on February 14, 1990. (Doc. #000109)

I. Theta II Enterprises, Inc. answered both the original and amended petition on February 15, 1990 and the Court signed a motion for a jury bond. (Doc. #000130)

J. Drilled Crossings, Inc. filed its answer to both the original and amended petition on March 26, 1990 and the Court signed an Order for Jury Bond. (Doc. #000132)

K. On March 30, 1990 Ashland Oil, Inc. and Ashland Pipe Line Company filed a Petition for Removal. (Doc. #000001)

L. The petition for Removal filed by Ashland Oil, Inc. and Ashland Pipe Line Company (alleged service on February 28, 1990) said it was filed timely and stated Drilled Crossings, Inc., Theta II Enterprises, Inc. and Baker Pipeline, Inc. were Louisiana corporations. (Doc. #000001)

M. The Petition for Removal failed to state Ashland Oil, Inc. or Ashland Pipe Line Company had contacted the other defendants for permission to remove the case.

N. A motion to remand filed by plaintiffs, Jernigan, on April 30, 1990 was denied without written reasons and a motion for reconsideration filed August 16, 1990 was denied with written reasons.

ARGUMENT

28 USCS 1441 (in pertinent part)

(a) Except as otherwise expressly provided by Act of Congress, any actions brought in a State Court of which the District Court of the United States have original jurisdiction, may be removed by the defendant or defendants, to the District Court of the United States for the district and division embracing the place where such action is pending.

28 USCS 1446 (in pertainent part)

A defendant or defendants desiring to remove any civil action or criminal prosecution from a State Court shall file in the District Court of the United

States for the district and division within which such action is pending, a Notice of Removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The Notice of Removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on a defendant, whichever period is shorter.

Under the language of 28 USCS 1441 and 1446 which refer to the "defendant" or "defendants", it has long since been held that all of the defendants must join in the petition to remove. ***Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressman and Assistants' Local 349,*** 427 F.2d 325 (C.A. 5th Cir. 1970). The only exceptions to this rule have been set out in the case of ***Courtney v. Benedetto,*** 627 F.Supp. 523 (M.D. La. 1986). In that case, this Honorable Court held that all defendants must join in or consent to the Petition For Removal to Federal Court unless: (1) The non-joining defendant has not been served with process at the time that the removal petition is filed, (2) non-joining defendant is merely nominal or formal party, or (3) removal claim is separate and independant claim as defined by 28

USCB 1441(c). However, regardless of any exception thereto, the removal petition must set forth the reason why the defendants have not joined the Petition for Removal. Ashland failed to state any reason why the other defendants did not join in the removal. So in such a case, it has been held that the petition is "fatally defective". See ***Mayers v. Connell,*** **651 F.Supp. 273 (M.D. La. 1986).** Furthermore, "mere unsupported assertions of a codefendant's support cannot replace formal indication of support" as required under 28 USCS 1446. ***Knickerbocker v. Chrysler Corp.,*** 728 F.Supp. 460 (E.D. Mich. 1990).

In it's opinion the Fifth Circuit stated:

> [3] Jernigan also attacks the form of the notice of removal, insisting that it is fatally flawed because Ashland Oil neglected to obtain the consent of all codefendants and failed to explain the lack of such consent. We do not dispute Jernigan's statement of the law; as a general rule, removal requires the consent of all co-defendants. In cases involving alleged improper or fraudulent joinder of parties, however, application of this requirement to improperly or fraudulently joined parties would be nonsensical, as removal in those cases is based on the contention that no other proper defendant exists.
>
> Neither can we agree with Jernigan's contention that Ashland Oil's failure to explain the absence of codefendants' consent is fatal. Ashland Oil's notice to remove makes clear that it takes the position that no other proper defendant exists. Certainly, if there is no need to obtain

> the consent of the improperly or fraudulently joined defendants, it follows that the defendant need not explain the absence of consent.

There is no legal authority to support the statement by the United States Court of Appeal for the Fifth Circuit that in cases involving alleged improper or fraudulent joinder of parties that all co-defendants need not consent to the removal and the Fifth Circuit did not cite any authority.

In this case the District Court denied the Motion to Remand and decided a factual issue which was critical not only to the issue of jurisdiction but also critical to the merits of the case, i.e.: the two contract theory under Louisiana law, which would bar plaintiff's recovery against co-defendants other than Ashland.

In its written reasons for denial of the remand dated December 4, 1990 the District Court stated:

> "Thus, as plaintiffs concede, if Theta II had a contract with Drilled Crossings before the accident, then plaintiff may not recover from Drilled Crossings as a matter of law. Although Ashland submitted a copy of a contract between Theta II and Drilled Crossings dated 9 February 1989, it later supplemented the record to show a contract between the two concluded 6 January 1989. Furthermore, other proof shows that Theta II was performing services for Drilled Crossings on the date of the accident (4 February 1989). Contrary to plaintiffs' suggestions, this is not akin to a summary judgment procedure where an issue of

fact necessitates trial. Instead, the court may resolve contested issues of fact in order to determine jurisdiction. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981). Ample evidence suggests that Theta II had a contract with Drilled Crossings. Thus, Drilled Crossings is immune and its citizenship is to be disregarded in determining the existence of subject matter jurisdiction".

In *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981), the Court stated:

> "A. **The procedure and standards to be applied where it is alleged that there has been fraudulent joinder"**
>
> "[9] The burden of persuasion placed upon those who cry "fraudulent joinder" is indeed a heavy one. In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdiction facts. *Keating v. Shell Chemical Company,* 610 F.2d 328 (5th Cir. 1980); *Tedder v. F.M.C. Corporation, et al.,* 590 F.2d 115 (5th Cir. 1979); *Bobby Jones Garden Apartments v. Suleski,* 391 F.2d 172, 177 (5th Cir. 1968); *Parks v. New York Times Company,* 308 F.2d 474, 478 (5th Cir. 1962), *cert. denied,* 376 U.S. 949, 84 S.Ct. 964, 11 L.Ed.2d 969 (1964).

[10] In support of their removal petition, the defendants may submit affidavits and deposition transcripts; and in support of their motion for remand, the plaintiff may submit affidavits and deposition transcripts along with the factual allegations contained in the verified complaint. The district court must then evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff. *Keating v. Shell Chemical, supra; Tedder v. F.M.C., supra; Bobby Jones Garden Apartments v. Suleski, supra; Parks v. New York Times Company, supra.* Moreover, the district court must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff. *Bobby Jones Garden Apartments v. Suleski, supra; Dudley v. Community Public Service Company,* 108 F.2d 119 (5th Cir. 1939); *Howard v. General Motors Corporation,* 287 F.Supp. 646 (N.D.Miss.1968).

If, having assumed all of the facts set forth by the plaintiff to be true and having resolved all uncertainties as to state substantive law against the defendants, the district court should find that there is no possibility of a valid cause of action being set forth against the in-state defendant(s), only then can it be said that there has been a "fraudulent joinder." *Tedder v. F.M.C., supra; Keating v. Shell Chemical Company, supra* at 332. However, if there is even a possibility that a state court would find a cause of action stated against any one of the named in-state defendants on the facts alleged by the plaintiff, then the

federal court must find that the in-state defendant(s) have been properly joined, that there is incomplete diversity and that the case must be remanded to the state courts. *Parks v. New York Times, supra; Bobby Jones Garden Apartments v. Suleski, supra; Keating v. Shell Chemical Company supra,* at 333.

We believe that jurisdiction inquiry must not subsume substantive determination. This strict standard has been consistently applied by the Fifth Circuit in cases discussing fraudulent joinder. In *Parks v. New York Times Company,* 308 F.2d 474, 478 (5th Cir. 1962), cert. denied, 376 U.S. 949, 84 S.Ct 964, 11 L.Ed.2d 969 (1964), this Court stated "there can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged." Similarly, in *Bobby Jones Garden Apartments v. Suleski,* 391 F.2d 172, 177 (5th Cir. 1968) this Court (Brown, C.J.) found that

> where there have been allegations of fraudulent joinder . . . the question is whether there is arguable a reasonable basis for predicting that the state law might impose liability on the facts involved. If that possibility exists, a good faith assertion of such an expectancy in a state court is not a sham . . . and is not fraudulent in fact or in law.

In two recent cases, we have continued to apply the strict standard set forth in *Parks v. New York Times Company, supra* and *Bobby Jones, supra.* In *Tedder v. F.M.C. Corporation, et*

> *al*, 590 F.2d 115 (5th Cir. 1979) this Court affirmed a finding of fraudulent joinder, but did so only after having determined that as a *matter of law* there was no reasonable basis for predicting that the plaintiff might establish liability against a named in-state defendant. Last year, in *Keating v. Shell Chemical Company*, 10 F.2d 328 (5th Cir. 1980) this Court discussed the issue of fraudulent joinder and once again applied the rule adopted in *Parks, supra* and *Bobby Jones, supra*. In *Keating* we held, *inter alia*, that if there remained a possibility of a valid claim being stated against the in-state defendant, the case would be only properly cognizable only in the state courts."

In deciding the "critical" issue, which was factual, for purposes of jurisdiction the District Court also decided the "critical" issue on the merits under the Louisiana theory of the two contract theory thus eliminating plaintiffs' cause of action against co-defendants other than Ashland.

It is respectfully submitted that pursuant to *B., Inc. v. Miller Brewing Co., Inc., supra*, the District Court should have decided the "critical" factual issue concerning the contracts in favor of the plaintiffs. Had the District Court decided the "critical fact" issue in favor of plaintiffs, then there would not have been an "alleged improper or fraudulent joinder of parties."

CONCLUSION

The "Petition for Removal" was fatally flawed because Ashland did not secure the consent of the other co-defendants.

Respectfully submitted:

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on Behalf of Petitioners, Rex Jernigan and Rose B. Jernigan, has been furnished to all counsel of record on this the 28th day of July, 1993.

_____

JOSEPH J. WEIGAND, JR.

APPENDIX A

Rex Allen JERNIGAN and Rose B. Jernigan, Plaintiffs-Appellants,

v.

ASHLAND OIL INC., Ashland Pipe Line Co., and Drilled Crossings, Inc., Defendants-Appellees.

Rex A. JERNIGAN, Mrs., and Rex A. Jernigan, Mr., Plaintiffs,

v.

ASHLAND OIL INC., Ashland Pipe Line Co., Defendants.

No. 92-4916
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 30, 1993.

Oil pipeline worker and his wife brought personal injury action in Louisiana state court against various corporations, both foreign and domestic, while domiciled in Louisiana for injuries that worker sustained while installing pipeline. Foreign oil corporation removed action to federal district court, and plaintiffs sought remand. The

United States District Court for the Western District of Louisiana, F.A. Little, Jr., J., denied remand, and plaintiffs appealed. The Court of Appeals held that: (1) removal was timely within 30 days from time defendant discovered that case had become removable; (2) defendant alleging fraudulent joinder was not required to obtain consent of codefendants before removing case; and (3) Louisiana corporations were improperly joined based on their statutory immunity as worker's employer under Louisiana Worker's Compensation Law.

Affirmed.

Appeal from the United States District Court for the Western District of Louisiana.

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:

Plaintiffs-Appellants Rex and Rose Jernigan (collectively, Jernigan) appeal the dismissal of their claims against Defendants-Appellees Ashland Oil Inc. (Ashland Oil), Ashland Pipe Line Co. (Ashland Pipeline), and Drilled Crossings, Inc. claiming that removal under 28 U.S.C. § 1446(b) was improper and, therefore, that the district court lacked subject matter jurisdiction. As we find that the district court possessed jurisdiction, we affirm.

I

FACTS AND PROCEEDINGS

While domiciled in Louisiana, Jernigan filed suit there in state court against Ashland Oil and Ashland Pipeline, both foreign corporations, and Drilled Crossings, a Louisiana corporation, for personal injuries suffered by Rex Jernigan while installing a pipeline under the Red River. On January 29, 1990, Jernigan amended his complaint, adding several more defendants—Theta II Enterprise, Inc. (Theta II), and "Baker Pipeline, Inc., a subsidiary of Theta II Enterprises, Inc." (Baker)—both Louisiana corporations. Jernigan also added Baker Pipeline, Inc. as a defendant, referring inartfully to a previously liquidated Texas corporation named Baker Pipeline Construction Co., Inc. (Baker Pipeline Construction).

Baker, Theta II, and Drilled Crossings were served with copies of the amended pleading on January 29, 1990. Ashland Oil was served on February 2, 1990, and Ashland Pipeline was served on February 28, 1990. Ashland Oil removed the action to federal district court on March 30, 1990. Jernigan sought remand on grounds that removal was effected more than thirty days after the removing party received the initial pleadings.[1]

Ashland Oil responded, by affidavits, that its motion was timely because it had sought removal as soon as it became aware that the state court lacked subject matter jurisdiction; that previously the state court appeared to

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[1] 28 U.S.C. § 1447.

have had jurisdiction, albeit such appearance was erroneous, resulting from the fradulent or improper joinder of non-diverse parties. This allegation of fradulent joinder focused on Baker, which Ashland Oil claimed does not exist as a separate entity but merely as an unincorporated operating division of Theta II.[2] Finally, Ashland Oil argued that Theta II and Drilled Crossings are immune under the Louisiana Worker's Compensation Law,[3] and therefore must be disregarded for diversity purposes.

Jernigan did not respond to Ashland's affidavits, and the district court denied the motion to remand. Jernigan then filed a motion to reconsider, insisting that Jernigan's social security earnings show that he received wages from Baker, Baker Pipeline Construction, and Theta II. This was proof, Jernigan argued, that Baker is a separate entity from Theta II. In addition, Jernigan disputed Ashland Oil's contention that the contract between Theta II and Drilled Crossings predated the accident. If it did not, posits Jernigan, then Drilled Crossings would not be immune as a matter of law, and its citizenship would not be disregarded for diversity purposes.

The district court considered Jernigan's new evidence despite Jernigan's previous failure to respond to the first motion. Stating that a district court may resolve factual disputes to determine jurisdiction, the district

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[2] There is some confusion whether Baker as merely a division of Theta II or an incorporated wholly-owned subsidiary, but for purposes of the legal issues here under consideration, that distinction is immaterial, so long as Baker was not a separate entity independant of Theta II.

[3] La.Rev.Stat.Ann. 23:1032, 23:1061.

court found "ample evidence" that the subject contract between Theta II and Drilled Crossings existed prior to the date of the accident. The district court concluded therefore that Drilled Crossings was immune and that its citizenship must be disregarded for diversity purposes. Consequently, the district court denied the motion to reconsider and subsequently granted summary judgment motions for all the defendants. Jernigan timely appealed.

II

ANALYSIS

The sole issue before us is whether, by virtue of diversity, the district court possessed subject matter jurisdiction over Jernigan's claim against Ashland Oil. This issue implicates two considerations: (1) was Ashland Oil's removal proper; and (2) did the district court err in determining that a contract existed between Theta II and Drilled Crossings, the absence of which would make joinder of Theta II proper and destroy diversity and require remand. Before beginning our analysis of these issues, some background discussion is helpful.

[1] It is axiomatic that diversity jurisdiction, the alleged basis of this court's jurisdiction in the instant case, requires complete diversity between plaintiffs and defendants. In other words, for diversity jurisdiction to exist, no plaintiff may be a domiciliary of the same state as any defendant. In the instant case, the respective domiciles of the parties are not in dispute; plaintiffs are both Louisiana domiciliaries; Ashland Oil and Ashland Pipeline are foreign corporations; the remaining defendants are Louisiana cor-

porations. As long as any of the Louisiana corporations are separate defendants in this case, complete diversity among the parties is lacking, making the district court powerless to decide the underlying claim. If, on the other hand, the Louisiana corporations are not considered separate from the non-Louisiana corporations, Ashland Oil and Ashland Pipeline, for purposes of determining diversity jurisdiction, then this case is one that could have been brought in federal court originally, making removal proper and remand improper.

As the district court's opinion demonstrates, Ashland Oil contends that the Louisiana corporations should not be considered in determining diversity. Ashland Oil insisted, and the district court so found, that Baker is not a proper party because it is not a separate entity, but is in fact a division of Theta II. (The same result would appertain if Baker were separately incorporated but wholly owned by Theta II.) And, Theta II's citizenship is irrelevant because it is Jernigan's employer and, under Louisiana law, Jernigan's remedies against his employer are restricted exclusively to his worker's compensation damages. As Theta II thus may not be held liable in tort to Jernigan, its citizenship is not considered in determining diversity. Ashland Oil's final contention is that Drilled Crossings is also the statutory employer of Jernigan by virtue of Theta II's contract with Drilled Crossings, in which Theta II, as Drilled Crossings subcontractor, agreed to perform the services that Drilled Crossings had contracted to perform for Ashland Oil.

A. *Removal*

Ashland Oil states without contradiction that the first time it could have realized that Drilled Crossings and all of the other defendants were improperly joined was when it received a copy of Drilled Crossings' answer, filed on March 23, 1990. Ashland Oil immediately compared the answers of Drilled Crossings and Theta II, then communicated with counsels for these companies, recognizing for the first time possible the relationship between Drilled Crossings and Theta II. A week later, on March 30, 1990. Ashland Oil removed the case to federal court pursuant to § 1446(b), which provides:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty (30) days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be asscertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by § 1333 of this Title more than one (1) year after commencement of the action.[4]

Ashland Oil thus avers that not until March 23, 1990, could it discover that none of the Louisiana corporations were proper defendants and that therefore diversity jurisdiction existed. Jernigan has never controverted this assertion, so we, like the district court, accept as true Ashland Oil's contention that it was not aware that the case was removable until March 23rd.

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[1] 28 U.S.C. § 1446(b).

[2] Jernigan does, however, attack the validity of Ashland Oil's removal on two grounds. First, he asserts that the removal was not timely. But, he does so measuring the thirty days from the initial service of the defendants, not from the time Ashland Oil discovered the availability of removal. Jernigan's argument is without merit, however, as § 1446(b) expressly grants an additional thirty days from the time that a defendant discovers that the case has become or always has been removable. The thirty days is measured from receipt of whatever writing—in this case Drilled Crossings' answer—constitutes first notice. Ashland Oil's notice of removal was filed well within the thirty days granted under § 1446(b).

[3] Jernigan also attacks the form of the notice of removal, insisting that it is fatally flawed because Ashland Oil neglected to obtain the consent of all codefendants and failed to explain the lack of such consent. We do not dispute Jernigan's statement of the law; as a general rule, removal requires the consent of all co-defendants. In cases involving alleged improper or fraudulent joinder of parties, however, application of this requirement to improperly or fraudulently joined parties would be nonsensical, as removal in those cases is based on the contention that no other proper defendant exists.

Neither can we agree with Jernigan's contention that Ashland Oil's failure to explain the absence of its codefendants' consent is fatal. Ashland Oil's notice to remove makes clear that it takes the position that no other proper defendant exists. Certainly, if there is no need to obtain the consent of the improperly or fraudulently joined defendants, it follows that the defendant need not explain the absence of consent.

B. *Determination of Jurisdiction*

[4,5] Once a case has been removed, the removing party bears the burden of proving that the court has jurisdiction to hear the claim.[5] If the removing party alleges jurisdiction on the basis that non-diverse parties have been fraudulently joined, then the removing party must prove the existence of fraud.[6] To prove its allegation of fraud, Ashland Oil "must show either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the instate defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts."[7]

In determining whether the joinder of partics was fraudulent, the district court "must evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff."[8] In this context, the proceeding "is similar to that used for ruling on a motion for summary judgment under Fed.R.Civ.P., Rule 56(b)."[9] If there is "arguably a reasonable basis for predicting that the state law might impose liability on the facts involved," then there is no

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[5] *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992) (citations omitted).

[6] *Carriere v. Sears, Roebuck and Co.*, 893 F.2d 98 (5th Cir.), *cert. denied*, 498 U.S. 817, 111 S.Ct. 60, 112 L.Ed.2d 35 (1990).

[7] *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981).

[8] *Id.* at 549.

[9] *Id.* at 549 n. 9.

fraudulent joinder.[10]

[6] Ashland Oil proceeded to prove that, as a matter of law, Jernigan cannot establish a cause of action against any of the Louisiana corporations in state court. In support of this position, Ashland Oil submitted affidavits and depositions to the district court. That court found such evidence compelling and concluded that the Louisiana corporations had been fraudulently joined. In reaching this conclusion, the court found that there was ample evidence to support Ashland Oil's claims that (1) Baker was a division or subsidiary of Theta II and had no independent existence; and (2) a contract existed between Drilled Crossings and Theta II at the time of the accident. Included in the district court's findings is the fact that Baker Pipeline Construction had been dissolved, making legally impossible any role of that corporation in the instant occurrences.

Although the district court appears to have articulated the incorrect standard when it concluded that it could resolve factual disputes in determining jurisdiction,[11] we find that the result reached was nonetheless the correct one. A review of the record discloses that in actuality there are no genuine issues of

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[10] *Bobby Jones Garden Apts. v. Suleski*, 391 F.2d 172, 177 (5th Cir. 1968). Jernigan correctly asserts that the district court applied the wrong standard, apparently misreading *Miller Brewing Co.*, 663 F.2d at 545, for the proposition that a district court could resolve factual disputes in order to determine jurisdiction. As we explain below, however, the district court's misplaced reliance on *Miller Brewing* does not alter the outcome of this case, however, as application of the correct standard mandates the same result.

[11] *See supra* note 10.

material fact. Rather, the only "issues" allegedly contested are unilateral with Jernigan, produced entirely by his own confusion as to the identity of his employer. As with a summary judgment motion, in determining diversity the mere assertion of "metaphysical doubt as to the material facts"[12] is insufficient to create an issue if there is no basis for those facts. In the instant case, there are just no facts available to be construed in Jernigan's favor because as a matter of law his allegations of corporate and contractual relationships simply cannot exist.

Jernigan's arguments are not entirely clear. He concedes in his pleadings that Baker is a subsidiary of Theta II[13] and he admits, at least implicitly by his arguments, that Theta II was his statutory employer.[14] Nonetheless, he continues to dispute whether Theta II had entered into a contract with Drilled Crossings at the time of his injury. His argument on this point consists of two elements. First, he notes that the contract dated January 6, 1989 was between Drilled Crossings and *Baker Pipeline,* not Theta II. Second, he refers to testimony of James R. Baker, Jr., that Jerry G. Baker, the party who signed the contract, was the sole owner of Baker Pipeline Construction Co. and that Jerry G. Baker had no connection with Theta II enterprises.

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[12] *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

[13] Jernigan's amended complaint names as a defendant "Baker Pipeline, Inc., a subsidiary of Theta II Enterprises, Inc."

[14] Specifically, he concedes that if there is a contract between Theta II and Drilled Crossings, then Drilled Crossings is immune from suit. This can only be true if Theta II is Jernigan's statutory employer.

Stated more cogently, Jernigan claims that the "Baker Pipeline" listed on the contract is in fact Baker Pipeline *Construction*, which he mislabeled in his complaint as Baker Pipeline, Inc. But, even if we construe Jernigan's factual disputes and contradictions in his favor, he must fail on his allegations as a matter of law. It is indisputable that the contract on its face is between Drilled Crossings and Baker, *not* Baker Pipeline Construction. Moreover, at the time the contract was executed, Baker Pipeline Construction had been dissolved under Texas law and no longer existed as a legal entity. In his deposition testimony, James A. Baker, Jr. testifies that, although his brother Jerry held no formal office or position within Theta II, he (James) had authorized Jerry Baker to sign the contract on Theta II's behalf.

The only evidence Jernigan proffers in response as contradicting these undisputed facts is his own, conclusionary allegation that Jerry Baker entered into the contract with Drilled Crossings on behalf of his (nonexistent) corporation, Baker Pipeline Construction.[15] Such a bold, unsupported allegation is insufficient to raise a genuine issue of material fact in a summary judgment proceeding, and it is equally inadequate here.

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[15] Jernigan did submit evidence that he had received payments from Baker Pipeline Construction. It is conceded by Theta II, however, that Jernigan had previously been employed by Baker Pipeline Construction prior to its dissolution. Evidence of these payments, therefore, is irrelevant to the issue of his employment at the time of the accident, as he implicitly concedes by his arguments that he was then an employee of Theta II.

III

CONCLUSION

After stripping this case of the obfuscation that results from Jernigan's confusion between two similarly named companies—Baker Pipeline and Baker Pipeline Construction—we conclude as a matter of law that he is unable to recover from any of the named Louisiana corporations in state court. His statements to the contrary are insufficient as a matter of law, as they are nothing more than conclusionary allegations, wholly lacking in specific facutal support. As a result, the Louisiana corporations were improperly joined, so their citizenship is to be disregarded for purposes of determining diversity jurisdiction. Ashland Oil and Ashland Pipeline, the only remaining proper defendants are foreign corporations, entitled to remove the case within thirty days following their discovery of the improper joinder of the Louisiana corporations—which they did. Finally, Jernigan's arguments regarding the timeliness and form of the removal are without merit.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

APPENDIX B

Filed AUG 7, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

REX ALLEN JERNIGAN, HUSBAND
OF/AND ROSE B. JERNIGAN

CIVIL ACTION NO.
90-0585
SECTION "A"
(JUDGE LITTLE)

-vs-

ASHLAND OIL, INC., et al.

R U L I N G

Plaintiffs' motion to remand is DENIED. The unanswered authorities cited by defendant are persuasive.

Alexandria, Louisiana.

6 August 1990.

/s/ F. A. Little, Jr.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

Filed DEC 5, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

REX ALLEN JERNIGAN, HUSBAND
OF/AND ROSE B. JERNIGAN

-vs-

CIVIL ACTION NO.
90-0585
SECTION "A"
(JUDGE LITTLE)

ASHLAND OIL, INC. AND/OR
ASHLAND PIPE LINE COMPANY,
et al.

R U L I N G

This case arises from a personal injury Mr. Jernigan suffered at work installing a pipeline under the Red River. Plaintiffs' amended complaint brings claims against Ashland Oil; Drilled Crossings, Inc., Ashland's contractor for the project; Baker Pipeline, Inc.; Theta II Enterprises, Inc., Drilled Crossings' subcontractor for the project; and "Baker Pipeline, Inc., a subsidiary of Theta II Enterprises, Inc." Ashland and Baker Pipeline, Inc. are diverse defendants. Theta II, Drilled Crossings, and Baker Pipeline, Inc. (the subsidiary, hereinafter referred to as "Baker") are Louisiana citizens. Plaintiffs brought their claim in the Twelfth Judicial District Court for the Parish of Avoyelles.

Defendant Ashland Oil was served with the amended pleading on 2 February 1990. Ashland removed the action to this court on 30 March 1990. Plaintiffs sought to remand on the basis that removal was effected more than thirty days after receipt of the initial pleading. 28 U.S.C. § 1447. Plaintiffs also sought to remand on the ground that it sued non-diverse citizens. Ashland responded with supporting affidavits that it effected removal as soon as it became aware that the court lacked subject matter jurisdiction due to fraudulent joinder of non-diverse parties, thus, its removal was timely. *See* Wright, Miller & Cooper, 14A *Federal Practice and Procedure,* § 3732 at 530 (1985). It also responded with supporting affidavits that Baker Pipeline, Inc. though non-diverse, is in no way related to Jernigan's employer, Theta II. It further showed that Baker does not exist as a separate entity, but as an operating division of Theta II. Finally, it argued that under Louisiana law, Theta II and Drilled Crossings are immune from this action under the Louisiana Worker's Compensation Law. La. Rev. Stat. Ann. 23:1032, 23:1061. Because plaintiffs could not recover from the non-diverse defendants in state court as a matter of law, they are to be disregarded for diversity purposes. *Hensqens v. Deere & Co.*, 833 F.2d 1179, 1181 (5th Cir. 1987). Plaintiffs failed to respond. The court denied the motion to remand, finding Ashland's memorandum compelling. Order of 6 August 1990.

Before the court is plaintiffs' motion to reconsider that ruling. As grounds, they dispute whether Drilled Crossings and Theta II had concluded a contract before the accident. They point out that Ashland submitted an affidavit showing that the contract was concluded five days

after the accident, as well as a subsequent affidavit showing that the contract was concluded well before the accident. Plaintiffs also point out that Mr. Jernigan's 1988 social security earnings record reflects that he was paid at various times by Baker Pipeline, Inc., Baker Pipeline Construction Co., Inc. (a different company from either of the other previously mentioned Bakers), and Theta II Enterprises, Inc. The relevance of this argument is that if Baker is a separate corporate entity, plaintiffs allege that Drilled Crossings is not immune from the action under the Louisiana Worker's Compensation Law and is therefore not fraudulently joined.

Ashland's response to the motion to remand was filed 1 June 1990. The court rendered its order on 6 August 1990. Plaintiffs had more than two full months to respond to these arguments. Motions for reconsideration may not serve as the first time to tender new legal theories, or to present new evidence that could have been adduced during the time in which the first motion was pending. *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656, 665 (N.D. Ill. 1982), *aff'd* 736 F.2d 388 (7th Cir. 1984). Of course, because the motion relates to whether the court possesses subject matter jurisdiction, the argument will nevertheless be considered.

Ashland submitted proof showing that Jernigan had not worked for Baker Pipeline Construction Co., Inc. since June 1988. The proof shows that he was not working for Baker Pipeline Construction Co., Inc. on the date of the accident. That company was not involved in the pipeline project. Thus, he could not recover from it as a matter of law because it had no role in the accident. Other proof shows

that Rex Jernigan's employer was Theta II. The only "confusion," to which plaintiffs refer, was apparently caused by the fact that Jernigan did not know for whom he was working at the time of the accident.

Thus, as plaintiffs concede, if Theta II had a contract with Drilled Crossings before the accident, then plaintiff may not recover from Drilled Crossings as a matter of law. Although Ashland submitted a copy of a contract between Theta II and Drilled Crossings dated 9 February 1989, it later supplemented the record to show that a contract between the two concluded 6 January 1989. Furthermore, other proof shows that Theta II was performing services for Drilled Crossings on the date of the accident (4 February 1989). Contrary to plaintiffs' suggestions, this is not akin to a summary judgment procedure where an issue of fact necessitates trial. Instead, the court may resolve contested issues of fact in order to determine jurisdiction. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981). Ample evidence suggests that Theta II had a contract with Drilled Crossings. Thus, Drilled Crossings is immune and its citizenship is to be disregarded in determining the existence of subject matter jurisdiction.

The court DENIES plaintiffs' motion to reconsider.

Alexandria, Louisiana.

4 December 1990.

/s/ F. A. Little, Jr.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

Filed FEB 26, 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

REX ALLEN JERNIGAN, HUSBAND
OF/AND ROSE B. JERNIGAN

CIVIL ACTION NO.
90-0585
SECTION "A"
(JUDGE LITTLE)

-vs-

ASHLAND OIL, INC. AND/OR
ASHLAND PIPE LINE COMPANY,
et al.

J U D G M E N T

For written reasons assigned this date, the plaintiffs claims against Drilled Crossings, Inc., are DISMISSED with prejudice to the refiling of same.

Alexandria, Louisiana.

26 February 1991.

/s/ F. A. Little, Jr.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

Judgment entered 2-27-91

Filed FEB 26 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

REX ALLEN JERNIGAN, HUSBAND
OF/AND ROSE B. JERNIGAN

CIVIL ACTION NO.
90-0585
SECTION "A"
(JUDGE LITTLE)

-vs-

ASHLAND OIL, INC. AND/OR
ASHLAND PIPE LINE COMPANY,
et al.

R U L I N G

What's in a name?
That which we call a rose by any other name would smell as sweet.[1]

This case arises from an injury to Rex Jernigan that occurred while he was engaged in the course and scope of his employment for Baker Pipeline Co. Unfortunately, substantial disagreement exists between the parties as to *which* Baker Pipeline Co. employed Mr. Jernigan; there are two Baker Pipeline companies, apparently. By its motion for summary judgment, Drilled Crossings, Inc. seeks to clarify this vexing issue. Upon the resolution of this issue

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[1] W. Shakespeare, *Romeo & Juliet*, Act II, Scene 2.

turns Drilled Crossings' contention that it is the statutory employer of Rex Jernigan and is therefore immune from suit under the Louisiana Worker's Compensation Act. La. Rev. Stat. art. 23:1021 et seq.

Ashland Pipeline Co. employed Drilled Crossings, Inc. for the purpose of laying pipeline under the bed of the Red River. In turn, Drilled Crossings contracted with an entity referred to in the contract as "Baker Pipeline." The dispute relates to which Baker Pipeline employed Mr. Jernigan. Two possible candidates exist. The first candidate is Baker Pipeline Co. This organization is an unincorporated division (or affiliate) of Theta II Enterprises, Inc. and the summary judgment proof shows that it has no status as a separate legal entity existing apart from Theta II. The primary stockholder of Theta II is James Baker. The second candidate is known as Baker Pipeline Construction Co., Inc. The summary judgment proof shows that this corporation no longer exists. It laid off all its employees and filed for bankruptcy. When it existed, it was a Texas corporation that was formed for the purpose of performing one job in Texas. Baker Pipeline Construction Co., Inc. never performed any work in Louisiana. Its primary stockholders were Ralph Baker and Jerry Baker, James Baker's father and brother respectively.

Plaintiffs contend that Mr. Jernigan worked for Baker Pipeline Construction Co., Inc. at the time of the accident. It is undisputed that Mr. Jernigan worked for Baker Pipeline Construction Co., Inc. before it was dissolved in June 1988. Drilled Crossings contends that once that corporation was dissolved, its primary stockholders purchased shares in Theta II. The Bakers did not commingle

any of the assets of Baker Pipeline Construction Co., Inc. with those of Theta II. Because the "Baker Pipeline" named possessed a widely known reputation in the industry, the Bakers continued to use it when they became involved with Theta II. More importantly, Theta II employed several former Baker employees, including Mr. Jernigan, in its Baker Pipeline division after Baker Pipeline Construction Co., Inc. ceased operations.

The proof that Jernigan was employed by Theta II through its Baker Pipeline Co. division is overwhelming. First, all the summary judgment proof shows that Baker Pipeline Construction Co., Inc. has ceased operations and is liquidated. It exists in name only, in the sense that it is under the supervision of the United States Bankruptcy Court. More importantly, Jernigan left this corporation's employ and went to work for an entirely unrelated corporation, Theta II. Second, Theta II was the sole provider of Mr. Jernigan's health insurance, as well as the entity providing him with paychecks, after 6 July 1988. Plaintiffs have elicited no summary judgment proof to contradict the proof showing that on 4 February 1989, Baker Pipeline Co., an unincorporated entity operated by Theta II Enterprises, Inc., was Rex Jernigan's employer.

As such is the case, Drilled Crossings is the principal of Theta II and Baker Pipeline Co. within the meaning of the Worker's Compensation Act. A general contractor that hires a subcontractor to perform work that is part of the nature and purpose of the general contractor's business is a statutory, although fictitous, employer of the subcontractor's employees. *Bradford v. Village Ins. Co.*, 548 So. 2d 106, 108 (La. App. 2d Cir. 1989), *writ denied* 552 So. 2d 396

(1989). Thus, it is entitled to the same immunity afforded to Jernigan's employer. La. Rev. Stat. Ann. art. 23:1032(A)(1)(a). Plaintiffs do not contest this point.

Thus, the court GRANTS Drilled Crossiings' motion for summary judgment and DISMISSES plaintiffs' claims against it with prejudice to the refiling of same.

Alexandria, Louisiana.

26 February 1991.

/s/ F. A. Little, Jr.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

Filed FEB 26, 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

REX ALLEN JERNIGAN, HUSBAND
OF/AND ROSE B. JERNIGAN

CIVIL ACTION NO.
90-0585
SECTION "A"
(JUDGE LITTLE)

-vs-

ASHLAND OIL, INC. AND/OR
ASHLAND PIPE LINE COMPANY,
et al.

J U D G M E N T

For written reasons assigned this date, the court DISMISSES all claims brought by plaintiffs against Theta II Enterprises, Inc. with prejudice to the refiling of same.

Alexandria, Louisiana.

26 February 1991.

/s/ F. A. Little, Jr.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

Judgment entered 2-27-91

Filed FEB 26 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

REX ALLEN JERNIGAN, HUSBAND
OF/AND ROSE B. JERNIGAN

CIVIL ACTION NO.
90-0585
SECTION "A"
(JUDGE LITTLE)

-vs-

ASHLAND OIL, INC. AND/OR
ASHLAND PIPE LINE COMPANY,
et al.

R U L I N G

Before the court is the motion for summary judgment of Theta II Enterprises, Inc. This action arose from an accident in which Rex Jernigan was injured while laying pipe under the Red River. Theta II was Jernigan's employer. The Jernigans brought suit in state court against the various contractors and subcontractors, including Theta II. That action was removed to this court.

Theta II is Mr. Jernigan's "employer" within the meaning of the Louisiana Worker's Compensation Act. La. Rev. Stat. Ann. art. 23:1021 et seq. Plaintiffs state in their memorandum in opposition to the motion that "[p]laintiff admits that he was a direct employee of Theta II Enterprises, Inc. on February 4, 1989. (See attached payroll

checks). In this regard, Theta II Enterprises, Inc. is entitled to summary judgment as the direct employer of plaintiff." This is the case because an employee's right to worker's compensation is exclusive of all other rights and remedies against his employer. La. Rev. Stat. Ann. art. 23:1032(A)(1)(a).

Thus, because there is no genuine issue of material fact and because Theta II is entitled to judgment as a matter of law, the court GRANTS the motion for summary judgment and DISMISSES all of plaintiffs' claims against it with prejudice to the refiling of same.

Alexandria, Louisiana.

26 February 1991.

/s/ F. A. Little, Jr.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

Filed DEC 18 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

REX ALLEN JERNIGAN, HUSBAND
OF/AND ROSE B. JERNIGAN

-vs-

CIVIL ACTION NO.
90-0585
SECTION "A"
(JUDGE LITTLE)

ASHLAND OIL, INC. AND/OR
ASHLAND PIPE LINE COMPANY
et al.

J U D G M E N T

For written reasons assigned this date, Ashland Pipeline's motion for summary judgment is GRANTED and all claims against it are DISMISSED.

Alexandria, Louisiana.

18 December 1991.

/s/ F. A. Little, Jr.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

Judgment entered 12-19-91

Filed DEC 18 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

REX ALLEN JERNIGAN, HUSBAND
OF/AND ROSE B. JERNIGAN

CIVIL ACTION NO.
90-0585
SECTION "A"
(JUDGE LITTLE)

-vs-

ASHLAND OIL, INC. AND/OR
ASHLAND PIPE LINE COMPANY,
et al.

R U L I N G

In January of 1989, Ashland Pipe Line Company, a subsidiary of Ashland Oil Company, entered into a contractual agreement with Drilled Crossings to construct a directionally drilled four inch pipeline beneath the Red River. The purpose of the pipeline was to carry crude oil from the storage tanks of other companies to another pipeline that eventually carried it to the refinery. Drilled Crossings, in turn, contracted with Baker Pipeline, an unincorporated division of Theta II Enterprises. Theta II provided Drilled Crossings with welders, laborers, and equipment for the pipeline construction project. This action for personal injury damages arose when Rex Jernigan, the plaintiff in this action, was injured within the course and scope of his employment as a general laborer or "roustabout" on the Red River pipeline construction project.

On 4 February 1989, the plaintiff was tailing the end of the pipe into a hole in the river to insure that the end of the pipe would not be damaged or scarred when it fell off the roller. When the pipe eventually fell, the plaintiff caught it and was suddenly jerked to his knees, causing him to rupture a disc in his lower back. Plaintiff and his wife subsequently filed a negligence action in the Twelfth Judicial District, Parish of Avoyelles, State of Louisiana, alleging a failure to provide adequate workers and equipment to perform the job safely, a failure to insure that the work was being performed, and a failure to provide plaintiff with a safe workplace. Mrs. Jernigan also claimed a loss of consortium as a result of the accident.

Once removed to federal court pursuant to 28 U.S.C. § 1332, it was determined that Mr. Jernigan's employers for purposes of this action were Theta II and Drilled Crossings, as the principal of Theta II. As both the statutory employer and principal respectively, Theta II and Drilled Crossings were held by this court to fall within the purview of the Worker's Compensation Act. All claims by the plaintiffs against Theta II and Drilled Crossings were dismissed by this court when it granted both defendants' motions for summary judgment.

Presently before this court are a number of motions. The first is a motion filed by Ashland Oil Company requesting summary judgment in its favor as against the plaintiffs. The plaintiffs have also filed a motion opposing Ashland's request for summary judgment and requesting trial on the merits. The second is a motion for summary judgment filed by Ashland Oil seeking contractual indemnity from Drilled Crossings. The third is a motion for sum-

mary judgment filed by Drilled Crossings requesting summary judgment in its favor as against Ashland Pipeline on the issue of indemnity.

The first issue that must be addressed by this court is the issue of liability. Based on the evidence presented by both the plaintiff and Ashland Pipeline, there existed a contract between Ashland Pipeline and Drilled Crossings to perform the Red River project. Drilled Crossings then subcontracted with Theta II for welders, laborers, and equipment to perform the welding, buffing, and coating of the pipe. It is undisputed that Mr. Jernigan was an employee of Theta II, the independent contractor.

In Louisiana, it is well settled that a principal is not liable for the offenses of its independent contractor committed while performing under a contract. *Grammer, et al v. Patterson Services, Inc. et al*, 860 F.2d 639, 641 (5th Cir. 1988); *Bartholomew v. CNG Producing Co.*, 832 F.2d 326 (5th Cir. 1987); *Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548, 549 (5th Cir. 1987). There are two exceptions to this general rule.

The first exception requires that a principal be held liable for injuries resulting from an ultrahazardous activity. *Grammer*, 860 F.2d at 326. Louisiana law defines ultrahazardous within three boundaries:

> (1) the activity must relate to land or some other immovable; (2) the activity itself must cause the injury, and the defendant must be engaged directly in the injury-producing activity; and (3) the activity must require substandard conduct to cause injury. . . . The 'ultrahazardous' label is thus

> limited to those activities which present "risk of harm that cannot be eliminated through the exercise of due care.

Ainsworth v. Shell Offshore, Inc., 829 F.2d 548 (5th Cir. 1987). Both parties concede that drilling operations of the nature in question in this case, do not constitute ultrahazardous activities under Louisiana law. Thus, the exception is inapplicable.

The second exception to the general rule holds a principal liable for the negligent acts of its independent contractor when the principal retains or exercises operational control. *Ainsworth*, 829 F.2d at 550. This is the point upon which the dispute between the plaintiff and defendant rests.

The plaintiff argues that based on the deposition testimony, using machinery to tail the pipe would have been a safer method than using personnel. Additionally, the plaintiff contends that because Ashland provided employees who were on the worksite periodically, Ashland knew or should have known that the practice used to tail the pipe was an unsafe one and thus, implicitly, authorized it.

The evidence indicates that although Ashland provided an inspector for the Red River project, his only purpose was to insure that the pipeline was welded and put in place in accordance with the specifications of the contract. He was not given instructions to be a safety inspector of any type. "The fact that [the principal] periodically inspected the jobsite to be sure that work was being performed in accordance with the specifications does not constitute

the exercise of operational control." *Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548 (5th Cir. 1988)(quoting *Williams v. Gervais Favrot Co.*, 499 So. 2d 623 (La. Ct. App. 4th Cir. 1986).

The deposition of Clarence Clark, an Ashland Pipeline employee, further indicates that Ashland had no preferences and made no suggestions about how the tail end of the pipe was to be guarded or protected. He stated that Ashland was only concerned with "results" and not the process by which the results were achieved. *See* deposition of Clarence Clark at 72. Delane Burnett, an Ashland engineering assistant whose position was essentially that of "gopher," stated in his deposition that he had no authority to supervise operational practices and knew little about the process of tailing pipe. *See* deposition of Delane Burnette at 10-16. The testimony of Marvin Bourg, a mechanic for Theta II, also indicated that the Ashland inspector present on the worksite was only there to make sure that the project was done in conformity with the specifications. *See* deposition of Marvin Bourg at 18-20. There has been no evidence presented to this court to substantiate plaintiff's claim that Ashland Pipeline or Ashland Oil Company exercised operational control over the pipeline project. Thus, neither Ashland Pipeline nor Ashland Oil Company was "under a duty to take affirmative action to protect the employees of the independent contractor, [Theta II,] from injuries sustained in the course of the contracted-for work" by providing additional workers or equipment to tail the pipe. *Hawkins v. Evans Cooperage Co., Inc.*, 766 F.2d 904, 906 (5th Cir. 1985).

Parenthetically, the court finds the applicability of

the Louisiana Oilfield Anti-Indemnity Act to be a non-issue in this case. The contract between Ashland Pipeline and Drilled Crossings does not pertain to the production or exploration of oil as required by the Act, but is related to the process of refining oil. It is clear that the legislature of Louisiana did not intend the Act to apply to activities that do not relate directly to the exploration or production of oil. *See Transcontinental v. Lloyds, London*, 734 F. Supp. 708, 716 (M.D. La. 1990).

Based on the foregoing conclusions of law, the Anti-Indemnity Act does not apply to the Ashland Pipeland—Drilled Crossings agreement. The terms of the indemnity agreement must govern the obligations of the parties. Thus, the court GRANTS Ashland's motion for summary judgment and DISMISSES all claims against it.

Alexandria, Louisiana.

18 December, 1991.

/s/ F. A. Little, Jr.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX G

Filed AUG 24, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

REX ALLEN JERNIGAN, HUSBAND
OF/AND ROSE B. JERNIGAN

CIVIL ACTION NO.
90-0585
SECTION "A"
(JUDGE LITTLE)

-vs-

ASHLAND OIL, INC. AND/OR
ASHLAND PIPE LINE COMPANY,
Et AL.

R U L I N G

The unopposed motion to remand the judgment of this court dated 18 December 1991 has been filed by Ashland Oil Company. The motion is GRANTED. The judgment is amended to read as follows:

> For written reasons assigned 18 December 1991, the motion for summary judgment filed by Ashland Oil Inc. and Ashland Pipe Line Company is GRANTED and all plaintiffs' claims against the defendants are DISMISSED with prejudice.

The motion for summary judgment filed by Ashland Oil, Inc. and Ashland Pipe Line Company against Drilled Crossings is GRANTED. All claims by Drilled Crossings for indemnity against Ashland are DISMISSED.

In accordance with 54(b) of the Federal Rules of Civil Procedure, this amended judgment is designated as a final judgment in this matter.

Alexandria, Louisiana.

24 August 1992.

/s/ F. A. Little, Jr.

F. A. LITTLE, JR.
UNITED STATES DISTRICT JUDGE

Judgment entered 8-25-92

(2)

AUG
OFFICE

NO. 93-184

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

REX ALLEN JERNIGAN AND ROSE B. JERNIGAN

Petitioners

VERSUS

ASHLAND OIL, INC., ASHLAND PIPE LINE CO. AND DRILLED CROSSINGS, INC.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS, ASHLAND OIL, INC., ASHLAND PIPE LINE CO. AND DRILLED CROSSINGS, INC.

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JUNEAU, JUDICE, HILL & ADLEY
(A Professional Law Corporation)
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Defendants/Respondents

BEST AVAILABLE COPY

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RULE 29 STATEMENT

The following is a list of all parent companies and subsidiaries of Ashland Oil, Inc., Ashland Pipe Line Company and Drilled Crossings, Inc.:

1. A O I Finance, Inc.
2. Adgraphics, Inc.
3. APAC Holdings, Inc.
4. APAC-Alabama, Inc.
5. APAC-Arizona, Inc.
6. APAC-Arkansas, Inc.
7. APAC-Carolina, Inc.
8. APAC-Florida, Inc.
9. APAC-Georgia, Inc.
10. APAC-Kansas, Inc.
11. APAC-Kentucky, Inc.
12. APAC-Mississippi, Inc.
13. APAC-Oklahoma, Inc.
14. APAC-Tennessee, Inc.

15. APAC-Texas, Inc.

16. APAC-Virginia, Inc.

17. APAC, Inc.

18. Archbald Holdings, Inc.

19. Archbald Power Corporation

20. Ash Property, Inc.

21. Ashchem I.P., Inc.

22. Ashcorp Five, Inc.

23. Ashland (Oman) Company

24. Ashland Branded Marketing, Inc.

25. Ashland Chemical (N.Z.) Inc.

26. Ashland Chemical Canada Ltd.

27. Ashland Chemical Italiana S.P.A.

28. Ashland Chemical Ltd.

29. Ashland Chemical Saudi Holdings, Inc.

30. Ashland Chemical, Inc.

31. Ashland Composite Polymers International, Inc.

32. Ashland Composite Polymers Limited

33. Ashland Construction Communications Company

34. Ashland Crude Marketing, Inc.

35. Ashland Crude Trading, Inc.

36. Ashland Development, Inc.

37. Ashland Electronic Products, Inc.

38. Ashland Engineering & Construction Holdings, Inc.

39. Ashland Enterprise One, Inc.

40. Ashland Ethanol, Inc.

41. Ashland Exploration Australia PTY, Ltd.

42. Ashland Exploration Holdings, Inc.

43. Ashland Exploration International, Inc.

44. Ashland Exploration Italia S.R.L.

45. Ashland Exploration Maroc Limited

46. Ashland Exploration Nigeria, Inc.

47. Ashland Exploration, Inc.

48. Ashland Export Company, Inc.

49. Ashland Foundry International, Inc.

50. Ashland Gas Marketing, Inc.

51. Ashland Korea Foundry Products, Limited

52. Ashland Nigerian Development Company

53. Ashland of Nigeria, Ltd.

54. Ashland Oil (Nigeria) Company Ultd.
55. Ashland Oil & Refining Company
56. Ashland Oil Enterprises, Inc.
57. Ashland Oil Holdings, Inc.
58. Ashland Oil International Limited
59. Ashland Oil Nederland B.V.
60. Ashland Overseas Investments, Inc.
61. Ashland Pacific PTY, Ltd.
62. Ashland Participacoes Ltda.
63. Ashland Petroleum, Inc.
64. Ashland Pipe Line Company
65. Ashland Plastics (UK) Limited
66. Ashland Plastics Australia PTY. Ltd.
67. Ashland Plastics Benelux B.V.
68. Ashland Plastics De Mexico S.A. De C.V.
69. Ashland Plastics France S.A.
70. Ashland Plastics International, Inc.
71. Ashland Plastics Ireland Limited
72. Ashland Plastics New Zealand Limited
73. Ashland Resimas Simtettcas Ltda.

74. Ashland Services Company

75. Ashland Specialty Polymers and Adhesives International, Inc.

76. Ashland Sud-Chemie Giesserei-Chemikalien GNBH

77. Ashland Synthetic Fuels, Inc.

78. Ashland-Avebene S.A.

79. Ashland-Sudchemie-Kernfest GNBH

80. Ashmont Insurance Company, Inc.

81. ATA Construction Company

82. ATEC, Inc.

83. B. V. Ashland-Suedchemie V.M. Necof

84. Barnes Transportation Company, Inc.

85. Berwyn Chemicals, Inc.

86. Birch Bru, Inc.

87. Blanton Marine Corp.

88. Bluegrass Insurance Company Limited

89. Bluegrass International Insurance Limited

90. Cogdo, Inc.

91. CLTA, Inc.

92. COAL, Inc.

93. Devon Chemicals, Inc.

94. Drew Ameroid (Deutschland) G.N.B.H.

95 Drew Ameroid (Singapore) PTE. Limited

96. Drew Ameriod Australasia PTY. Ltd.

97. Drew Ameroid France S.A.R.L.

98. Drew Ameroid International Corporation

99. Drew Ameroid Italiana S.R.L.

100. Drew Ameroid Japan Co., Ltd.

101. Drew Ameroid Nederland B.V.

102. Drew Ameroid Norge AS

103. Drew Ameroid U.K. Limited

104. Drew Chemical Corporation

105. Drew Chemical Limited

106. Drew Flocculant Corporation

107. Drew Greece Limited

108. Ecobard, Inc.

109. Equal Opportunity Finance, Inc.

110. Exaloid S.L.

111. Funding Corp. I

112. Funding Corp. II

113. Hapour, Inc.

114. Hodogaya Ashland Co., Ltd.

115. Hopsbru, Inc.

116. Hopstein Corporation

117. Iberia Ashland Chemical S.A.

118. Ig-Lo Transportation, Inc.

119. Ig-Lo, Inc.

120. Inland Towing Company

121. Instant Oil Change PTY. Ltd.

122. J. T. Trucklines, Inc.

123. Kernfest-Webac, A.B.

124. Lexington Coating Technology, Inc.

125. LHJ Holdings APS

126. Louisville Refining Co.

127. Mac's Oil & Chemicals, Inc.

128. Mid-Valley Supply Co.

129. Millwiss, Inc.

130. Mineer, Inc.

131. N. V. Drew Ameroid Belgium S.A.

132. Nettles, Inc.

133. Ohio River Pipe Line Company

134. Pine Bru, Inc.

135. Pipeline Holding Company, Inc.

136. Pipeline Leasing, Inc.

137. Properties Worldwide, Inc.

138. RCT Co., Inc.

139. Reeb, Inc.

140. Reg X Condor, Inc.

141. Relocation Properties Management, Inc.

142. Rhinebru, Inc.

143. Rich Oil, Inc.

144. Schooner Bur, Inc.

145. Scurlock Permian Corporation

146. Scurlock Permian Holdings, Inc.

147. Scurlock Permian International, Inc.

148. Scurlock Permian Pipe Line Corporation

149. Scurlock Permian Producers, Inc.

150. Scurlock Permian Trading, Inc.

151. Shelfcorp Four, Inc.

152. Shelfcorp Three, Inc.

153. Shelfcorp Two, Inc.

154. Southeastern Acquisition, Inc.

155. Southwest Land & Development Co., Inc.

156. Steinbru, Inc.

157. Superamerica Group, Inc.

158. Superamerica Kitchens, Inc.

159. Superamerica of Florida, Inc.

160. SWL Realty, Inc.

161. Tanner Companies United Metro Materials, Inc., The

162. Tanner Companies, The

163. Tanner Land Company, Inc.

164. Tanner Southwest, Inc.

165. Tap-Co, Inc.

166. Tercath Corporation

167. Thorough Bru, Inc.

168. Transport Supply Company, Inc.

169. Tri-State Marketing Services, Inc.

170. Tru Bru, Inc.

171. Unenco Foundry Products Limited

172. Valpet - Valvoline Produtos De Petroleo LTDA

173. Valvoline (Australia) PTY. Ltd.

174. Valvoline Canada Ltd./Valvoline Canada LTEE

175. Valvoline Instant Oil Change Franchising, Inc.

176. Valvoline Instant Oil Change, Inc.

177. Valvoline International, Inc.

178. Valvoline Nordisk Biltjeneste APS

179. Valvoline Oil AS

180. Valvoline Oil Company Limited

181. Valvoline Oil Nederland B.V.

182. Valvoline Sweden Aktiebolag

183. Valvoline, Inc.

184. VIOC Funding, Inc.

185. VIOC Properties, Inc.

186. Warren Brothers Hauling, Inc.

187. Webachen OY

188. Western Equipment Co.

189. Western Special Products Co., Inc.

190. Wheat Bru, Inc.

191. 1409 Corporation

192. 565 Corporation

STATEMENT OF THE CASE

The plaintiffs, Rex Allen Jernigan and Rose B. Jernigan, filed their initial lawsuit in this matter on December 11, 1989 against Ashland Oil, Inc. and Ashland Pipe Line Company (hereinafter sometimes collectively referred to as "Ashland") in the United States District Court for the Eastern District of Louisiana. Thereafter, on January 18, 1990, the plaintiffs filed a separate lawsuit in the Twelfth Judicial District Court, Avoyelles Parish, Louisiana, against Ashland and Drilled Crossings, Inc. The plaintiffs subsequently amended their state court suit on January 26, 1990 to add Baker Pipeline, Inc., Theta II Enterprises, Inc. and Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. as defendants.

With regard to service, Theta II Enterprises, Inc. was served with the plaintiffs' original and amended petitions on January 29, 1990. (R. 103). Service was attempted, but not made, upon Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. (R. 106). Drilled Crossings, Inc. was served on February 7, 1990. (R. 105). Ashland Oil, Inc. was served on February 2, 1990 (R. 107), and Ashland Pipe Line Company was served on February 28, 1990. (R. 118). No corporation exists under the name "Baker Pipeline, Inc."

Answers to the plaintiffs' original and amended petitions were filed by Theta II Enterprises, Inc. on February 15, 1990. On March 26, 1990, Drilled Crossings, Inc. filed its answer to the plaintiffs' original and amended petitions. Ashland Oil, Inc. and Ashland Pipe Line Company filed a joint

extension of time to answer the original and supplemental petitions on February 14, 1990. (Ashland Pipe Line Company was not served until February 28, 1990).

Ashland Oil, Inc. and Ashland Pipe Line Company filed a Notice of Removal in the United States District Court for the Western District of Louisiana on March 30, 1990, which effectively removed the plaintiffs' state court action to the United States District Court for the Western District of Louisiana. (R. 1). The basis of Ashland's removal was that all non-diverse defendants (defendants other than Ashland) were either intentionally added to defeat diversity or inadvertently added as defendants, despite the fact that the plaintiffs had no cause or right of action against them since the claims against those defendants were barred by the exclusive remedy

provision of the Louisiana Workers' Compensation Act (LSA-R.S. 23:1032).

On April 30, 1990, the plaintiffs filed a Motion to Remand, which was denied by the District Court on August 7, 1990. The plaintiffs subsequently filed a Motion for Reconsideration which was denied on December 5, 1990.

Thereafter, Ashland Oil, Inc., Ashland Pipe Line Company, Drilled Crossings, Inc. and Theta II Enterprises, Inc. filed motions for summary judgment on the issue of liability. Ashland's motions for summary judgment were granted on December 18, 1991. The motion for summary judgment filed on behalf of Drilled Crossings, Inc. was granted on February 26, 1991, and the motion for summary judgment

filed on behalf of Theta II Enterprises, Inc. was granted on December 16, 1991.

The plaintiffs then filed an appeal with the United States Court of Appeals for the Fifth Circuit on grounds that the alleged fraudulently joined defendants failed to join in the notice of removal, thereby rendering the removal defective. The United States Court of Appeals for the Fifth Circuit held that Ashland's removal was proper and that Ashland was not required to obtain consent to remove from the alleged fraudulently joined co-defendants before removing the case. The plaintiffs thereafter filed the currently pending petition for writ of certiorari with this Honorable Court.

ARGUMENT

Petitioners argue that the removal of this case was improper on grounds that the fraudulently and/or improperly named defendants did not join in the notice of removal filed by Ashland. As previously recognized by the United States District Court for the Western District of Louisiana and the United States Court of Appeals for the Fifth Circuit, the petitioners' argument is wholly without merit. Also, as decided by the Court in Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875 (1st Cir. 1983), a fraudulently joined party need not join in a removal petition and should be disregarded in determining diversity of citizenship.

From its inception, the only "real" defendant in this case was Ashland. As

previously indicated, the petitioners filed suit against Ashland Oil, Inc., Ashland Pipe Line Company, Theta II Enterprises, Inc., Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. and Baker Pipeline, Inc. Petitioners alleged that Rex Allen Jernigan was an employee of Theta II Enterprises, Inc., and/or Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. and/or Baker Pipeline, Inc. (R. 12). Petitioners' allegations against Theta II Enterprises, Inc., Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. and Baker Pipeline, Inc. were that these three defendants were his employer and that they were negligent. Clearly, the petitioners' claims against those three defendants were barred by the exclusive remedy provisions of Louisiana Workers' Compensation Law. Also, there is no corporate entity existing as "Baker Pipeline, Inc." and

therefore, the petitioners can have no claims against a non-existing entity. Drilled Crossings, Inc. was the statutory employer of Rex Allen Jernigan and therefore, like Theta II Enterprises, Inc. and Baker Pipeline, a subsidiary of Theta II Enterprises, is immune from the plaintiffs' claims in accordance with Louisiana Workers' Compensation Law. Therefore, based upon the above, the only potentially viable claims of the petitioners were those asserted against Ashland, since the petitioners' claims against their employers were barred and the claims against the non-entity were simply without merit. As such, all defendants other than Ashland were improperly and/or fraudulently joined by the plaintiffs and therefore, their citizenship was properly disregard for purposes of determining diversity jurisdiction. Petitioners do not dispute that diversity of

citizenship exists between Ashland and the petitioners.

Once the case was removed, Ashland had the burden of proving that the United States District Court had jurisdiction to hear the claim. Dodson v. Spiliada Maritime Corporation, 951 F.2d 40 (5th Cir. 1992). As will be shown below, that burden was clearly met by Ashland as it proved, as a matter of law, that the petitioners could not establish a cause of action against any of the Louisiana corporations named as defendants.

With regard to Baker Pipeline, Inc., Ashland produced the the deposition of James R. Baker, Jr. (R. 450-451), which showed that Baker Pipe Line, Inc. was a Texas corporation which was dissolved on September 19, 1988. Attached to the deposition of Mr. Baker are

documents from the State of Texas indicating that Baker Pipe Line, Inc. had been incorporated on August 25, 1986 and was dissolved on September 19, 1988, which dissolution occurred approximately five (5) months prior to the petitioner's alleged accident. (R. 473). Thus, Ashland showed that Baker Pipe Line, Inc. is a fraudulently joined defendant in this matter which should be disregarded for all purposes and specifically, for purposes of removal.

With regard to the other defendants, Theta II Enterprises, Inc. and Baker Pipe Line, a subsidiary of Theta II Enterprises, Inc. Ashland again produced the deposition of James R. Baker, Jr. wherein Mr. Baker appeared as the authorized representative of Theta II Enterprises, Inc. Mr. Baker testified that Baker Pipe Line is nothing more than an

unincorporated division of Theta II Enterprises, Inc. The precise relationship between the Baker Pipe Line division and Theta II Enterprises, Inc. was explained by Mr. Baker as follows:

> Q: Let me ask you this. There has been some discussion about Baker Pipe Line being a subsidiary or --
>
> A: We have -- to make this perfectly clear, we have an operating company called Baker Pipe Line. It is not a separate legal entity. It is not represented as a separate legal entity. Here is a company brochure. It says "Baker Pipe Line" to get the Baker name out this.
>
> And this was set up when Ralph Baker came to work for Theta II, in June, 1988, so that we could get my name and his name. People know in the industry as Baker out in front. And primarily it's Baker Pipe Line, a Theta II company. This is one of the company brochures.

(Deposition of James R. Baker, Jr., at pages 10-11, R. 455-456).

> Q: ...as I understand it, the Baker Pipe Line that signed the contract with Drilled Crossings for the Ashland job is not a corporation.

A: That is correct.

Q: It is not a partnership.

A: That is correct.

Q: It has no legal basis to exist other than as Theta II Enterprises.

A: That is correct.

Q: It is an unincorporated division of Theta II Enterprises.

A: That is correct.

(Deposition of James R. Baker, Jr. at pages 21-22, R. 459-460).

Additionally, at pages 34 and 35 of his deposition, Mr. Baker went on to explain that since Baker Pipe Line is essentially Theta II Enterprises, Inc., any employees working for Baker Pipe Line were in fact employees of Theta II Enterprises, Inc. and no one else. (R. 463-464). Mr. Baker further noted that Theta II Enterprises, Inc. had been the sole provider of Rex Jernigan's group health insurance and wages since July 6, 1988.

(Deposition of James R. Baker, p. 35, R. 464). This testimony clearly established that petitioner, Rex Allen Jernigan, was employed by Theta II Enterprises, Inc. and/or Baker Pipeline, a subsidiary of Theta II Enterprises, Inc. This fact was also admitted by petitioners in their First Supplemental and Amending Petition. (R. 12). Thus, inasmuch as Rex Jernigan was employed by Theta II Enterprises, Inc. at the time of his alleged accident, Theta II Enterprises, Inc. and/or Baker Pipe Line, a subsidiary of Theta II Enterprises, Inc. are immune from suit in this matter pursuant to LSA-R.S. 23:1032(A)(1)(a) which provides that:

> **The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or**

> relations, against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal, for said injury, or compensable sickness or disease.

Additionally, LSA-R.S. 23:1032(A)(1)(b) provides that:

> This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal, or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine.

Thus, inasmuch as petitioner, Rex Allen Jernigan, was employed by Theta II Enterprises, Inc. and/or Baker Pipeline, a subsidiary of Theta II Enterprises, Inc., those entities are immune from the claims of the petitioners and are therefore fraudulently and/or improperly joined defendants.

Under the statutory scheme cited above, a principal contractor is also immune from suit by the employee of a subcontractor. Guillory v. Bill Decote, 509 So.2d 455 (La. App. 3rd Cir. 1987), writ denied, 510 So.2d 376 (La. 1987). By way of the following, Ashland showed that this immunity applied to Drilled Crossings, Inc. At the time of Rex Jernigan's alleged accident, there was in effect a subcontract agreement for labor and materials dated January 6, 1989 which had been entered into by Drilled Crossings, Inc. and Theta II Enterprises. (R. 465-467). In discussing the January 6, 1989 contract between Theta II Enterprises, Inc. and Drilled Crossings, Inc., James R. Baker, Jr. explained in his deposition as follows:

> Q: **And if you notice the signature of paragraph on the left-hand side of the last page of the contract which we have marked as Number 7 it says "Baker Pipe Line."**

A: That's correct.

Q: Is that the Baker Pipe Line that is the unincorporated division of Theta II Enterprises, Inc.--

A: Yes, it is.

Q: --that Mr. Jerry Baker signed on behalf of ?

A: Yes, it is.

Q: So it was Theta II Enterprises that was entering into this contract with Drilled Crossings.

A: That's correct.

(Deposition of James R. Baker, Jr. at pp. 25 and 26, R. 461-462).

Based upon the above, Drilled Crossings was Rex Jernigan's statutory employer for purposes of the instant litigation due to the fact that Drilled Crossings, Inc. had contracted with Ashland to construct Ashland's pipeline crossing, and then Drilled Crossings, Inc. subcontracted with Theta II Enterprises, Inc. to perform some of the work which Drilled

Crossings, Inc. had agreed to perform under its contract with Ashland. In other words, the general contractor, Drilled Crossings, Inc., hired Theta II Enterprises, Inc. to perform a portion of the work on the Ashland pipeline project. The work which Theta II Enterprises, Inc. contracted to perform clearly constitutes a part of the work which the general contractor, Drilled Crossings, Inc., had contracted to perform under its contract with Ashland. Therefore, under the "two contract theory", Drilled Crossings, Inc. was the statutory employer of the plaintiff, Rex Jernigan, and is therefore immune from the claims asserted against it in this matter. Bradford v. Village Insurance Company, 548 So.2d 106 (La. App. 2nd Cir. 1989); Massey v. Century Ready Mix Corp., 552 So.2d 565 (La. App. 2nd Cir. 1989); Juris v. Llama Drilling Company, Inc., 457 So.2d 135 (La. App. 2nd

Cir. 1984); writ denied, 460 So.2d 1045 (La. 1984). These authorities were uncontested by the petitioners who conceded in their Memorandum in Support of Motion for Reconsideration of plaintiffs' Motion to Remand (R. 392) that if Theta II had a contract with Drilled Crossings, Inc. before the accident, they may not recover from Drilled Crossings, Inc. as a matter of law. As indicated above, Theta II did in fact have a contract with Drilled Crossings, Inc., and therefore, the petitioners had no right of recovery against Drilled Crossings, Inc. in this case and therefore, Ashland proved that Drilled Crossings, Inc. was a fraudulently and/or improperly joined defendant.

In order for the citizenship of parties to be considered for the basis of diversity,

the plaintiffs must have stated a cause of action and must in fact have a cause of action against them. Wright, Miller & Cooper, Federal Practice & Procedure Volume 14(A) §3723 (1985); Hensgens v. Deere & Company, 833 F.2d 1179, 1181 (5th Cir. 1987). In a case such as this where a plaintiff has joined his employer and his statutory employer, neither of which can have liability because of the exclusive remedy provisions of the Louisiana Worker's Compensation Act and against neither of which plaintiff has stated a cause of action, then their citizenship should not be taken into account for purposes of diversity in a removal action. Hensgens v. Deere & Company, supra; Cook v. Pep Boys, 641 F.Supp. 43 (E.D. La. 1985); Wright, Miller & Cooper, Federal Practice & Procedure Volume 14(A) §1323 (1985).

Since Ashland was the only defendant that the petitioners had a potential cause of action against in this matter, Ashland properly filed its notice of removal showing that the other entities named as defendants were not proper parties and had been joined solely for the purpose of defeating diversity. The fact that the fraudulently joined defendants did not join in the notice of removal cannot serve to defeat removal. Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875 (1st Cir. 1983); 1A J. Moore, Moores Federal Practice §§0.161[1-1] at nn. 23 & 25, 0.161[2], 0.168[3-2-2].

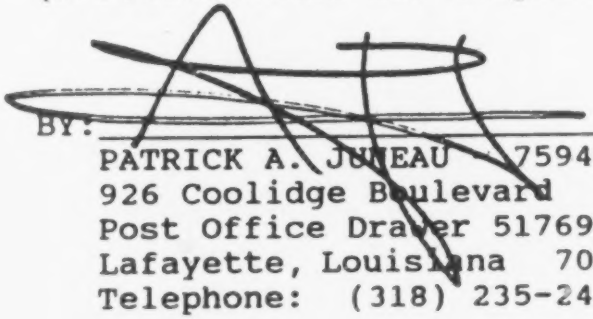
CONCLUSION

For all of the above and foregoing reasons, respondents, Ashland Oil, Inc, Ashland Pipe Line Company and Drilled

Crossings, Inc., respectfully submit that this case was properly removed from the Twelfth Judicial District Court for the Parish of Avoyelles, Louisiana to the United States District Court for the Western District of Louisiana, that the United States District Court and United States Court of Appeals for the Fifth Circuit properly held that the fraudulently joined defendants in this matter were not required to join in the notice of removal, and therefore, this case should not be reviewed by this Honorable Court.

Respectfully Submitted,

JUNEAU, JUDICE, HILL & ADLEY
(A Professional Law Corporation)



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the above and foregoing Original Brief in Opposition has been forwarded to the following parties by U. S. Mail, postage prepaid and properly addressed: Mr. Joseph J. Weigand, Jr., Post Office Box 6062, Houma, Louisiana 70361, Mr. Glenn G. Goodier, 201 St. Charles Avenue, New Orleans, Louisiana 70170-8000 and Mr. Thomas K. Brocato, Post Office Box 6118, Alexandria, Louisiana 71307-6118.

Lafayette, Louisiana on this the 27th day of August, 1993.

PATRICK A. JUNEAU - 7594